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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-743

CHARLES J. ROWE, Director of the Illinois Department of Corrections, and the PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

vs.

ARTHUR DECAR FERRIS,

Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

RECENT OPINIONS RENDERED BY THE STATE AND FEDERAL COURTS SITTING IN ILLINOIS ILLUSTRATE WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

On November 23, 1977, the Petitioner in this cause requested that this Court issue a writ of certiorari to review the judgment rendered by the United States Court of Appeals for the Seventh Circuit in the case of *United States ex rel. Ferris* v. *Finkbeiner,* 551 F. 2d 185 (7th Cir. 1977). That petition sets forth three distinct reasons why the *Ferris* opinion merits further appellate review: firstly, because the *Ferris* decision works to impose more stringent standards of voluntariness on guilty pleas received in Illinois courts than those which are applied to guilty pleas accepted under similar circumstances in the federal district courts; secondly, that the *Ferris* decision stands in conflict with a decision rendered by the Illinois Supreme Court on the same substantive issue, thereby imposing a new, retroactive rule of criminal procedure on the Illinois courts which is not constitutionally mandated; and finally, that failure to admonish the Respondent *Ferris* about the Illinois mandatory parole provisions did not render his guilty plea invalid. See, Petition for Certiorari, No. 77-743, pp. 9-22.

In his memorandum in opposition to the petition for certiorari, the Respondent seeks to refute all three of these contentions by asserting, *inter alia,* that "it appears from the dictum in (*People* v. *Wills,* 61 Ill. 2d 105, 330 N.E. 2d 505 (1975)) that the Seventh Circuit's decision below is in complete agreement with the Illinois Supreme Court." (Memorandum in Opposition to a Petition for Writ of Certiorari, No. 77-743, p. 5).

Naturally, the Petitioners continue to adhere to their belief that the *Wills* and *Ferris* opinions are at odds in their treatment of the constitutional issues raised by Mr. Ferris' case. However, the more crucial factor which must be considered in this regard is not how the parties themselves construe these two opinions, but rather, how these opinions are being treated by the state and federal courts sitting in the State of Illinois. As such, the Petitioners ask that this Court take notice of three recent cases which deal with the constitutional issues raised by the *Wills* and *Ferris* opinions.

The first of these cases comes from the Illinois Appellate Court for the Fifth Judicial District, and is entitled *People* v. *Tidwell.* (Pursuant to Supreme Court Rule 23, Ill. Rev. Stat., 1975, Ch. 110A, § 23, the *Tidwell* opinion is not officially reported in either the Illinois Reports or the North Eastern Reporter. A copy of that decision has therefore been included, *infra,* as Appendix A.) In *Tidwell,* a unanimous panel of the Illinois Appellate Court expressly stated that "*Ferris* is potentially an exception to the *Wills* holding rather than an interpretation of it." Similarly, the Appellate Court declined to equate *Wills* with the companion case to *Ferris, United States ex rel. Baker* v. *Finkbeiner,* 551 F. 2d 180 (7th Cir. 1977), by stating. "[w]e consider *Baker* a departure from *Wills* and decline to follow it." (Appendix A, *infra.*) Thus, regardless of what interpretation the parties here may have given to these cases, it is apparent that the Illinois courts consider *Wills* to be at odds with the decisions rendered in the *Ferris* and *Baker* cases.

In another case, this one arising in the federal district court for the northern district of Illinois, the court has held that the rule set forth in *Ferris* is to be given com-

pletely retroactive effect, thereby casting doubt on the continuing validity of nearly every guilty plea accepted in the State of Illinois between January 1, 1973 and May 19, 1975 (the date of the Illinois Supreme Court's *Wills* opinion). *United States ex rel. Williams* v. *Morris*, __ F. Supp. __, No. 77 C 2402 (N.D. Ill. Jan. 27, 1978; Marshall, J.). It thus appears that the *Ferris* opinion has in fact fashioned a new, retroactive rule of criminal procedure in Illinois which directly conflicts with the Illinois Supreme Court's opinion in the *Wills* case.

Finally, it appears that the Petitioners' fears that the *Baker* and *Ferris* cases will engender a flood of federal habeas corpus petitions based on those opinions are well-founded. Indeed, one district court in Illinois has already entertained a motion seeking to certify class-action relief in a habeas corpus action by which all prisoners who entered guilty pleas in Illinois courts between January 1, 1973, and May 19, 1975, and who were not admonished as to the mandatory parole provision, would be represented. *United States ex rel. Williams* v. *Illinois*, No. 77 C 1937 (N.D. Ill.; Marshall, J.). Although this motion was later withdrawn on a suggestion of mootness in that particular case, there are indications that such class-action relief will be sought in a similar case within the near future. Moreover, even as the petition in this case remains before this Court for consideration, no fewer than eight writs of habeas corpus have already been issued on the basis of *Ferris* and *Baker*, while well over a dozen such cases await disposition. Clearly, the State of Illinois now faces the prospect of having thousands of prisoners simultaneously launching collateral attacks on convictions which the State considers wholly valid. Whether these cases arise individually or as part of a class-action petition, they pose a serious problem

for the administration of the criminal justice system in Illinois. It is for that reason that the petitioners again pray that this Court grant a writ of certiorari in order that the *Ferris* opinion be given thorough review.

Respectfully submitted,

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APPENDIX A

No. 76-410

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

Filed December 30, 1977

PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Appellee,* v. ROBERT TIDWELL, *Petitioner-Appellant.*	Appeal from the Circuit Court of Madison County. Honorable Moses W. Harrison II, Judge Presiding.

KARNS, J.

ORDER

A post-conviction hearing was held in the Circuit Court of Madison County to examine the 1975 proceedings in which Robert Tidwell pleaded guilty to armed robbery and received a sentence of four to six years imprisonment. Defendant contends that his plea was involuntary because of the absence of effective assistance of counsel and that the court's failure to admonish him of the mandatory parole term denied him due process of law. The denial of relief following an evidentiary hearing is appealed here.

On February 27, 1975, defendant was indicted for the armed robbery of the Parkside Food Shop in Granite City. A week later at his arraignment, Tidwell pleaded not guilty and Richard Allen, a public defender, was appointed to represent him.

When called for trial on April 23, Tidwel appeared with Allen who withdrew; and Terryl Francis, who had been retained by Tidwell's mother, was allowed to enter his appearance as counsel. Francis said he could be ready by May 5, so trial was set for that day. On May 5, Francis requested a continuance, citing eye problems which he said had prevented him from preparing the case. The court granted the continuance in fairness to Tidwell but found Francis in contempt of court and fined him $500. In his order the trial court noted that according to Francis his eye problems existed when he accepted the case; the court stated his belief that Francis did not prepare because he believed he could dispose of the case without trial.

On May 12, 1975, Tidwell, still represented by Francis, changed his plea to guilty in return for the above-named sentence and dismisal of two other charges. Before accepting Tidwell's guilty plea, Judge Mosele gave Tidwell all of the admonitions prescribed by Rule 402 (Ill. Rev. Stat. 1974, ch. 110A, par. 402) except that he failed to admonish Tidwell that the sentence carried a mandatory five year parole term as required by section 5-8-1(e)(1) of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-8-1(e)(1)).

Tidwell maintains that the absence of an admonition regarding the mandatory parole term renders his guilty plea involuntary and therefore taken in violation of due process of law. This issue was decided by the Supreme Court in *People* v. *Wills*, 61 Ill. 2d 105, 330 N.E. 2d 505, cert. den., __ U.S. __, 96 S. Ct. 430 (1975). It was held in *Wills* that compliance with Rule 402(a)(2) requires that a defendant be admonished that a mandatory period of parole is part of his sentence. The court explicitly held, however, in its supplemental opinion that this requirement would apply only to those guilty pleas taken subsequent to May 19,

1975. (61 Ill. 2d at 111, 330 N.E. 2d at 509.) As Tidwell pleaded guilty before that date, his case is not includible within the prospective application of the *Wills* ruling. (*People* v. *Irons*, (Docket No. 76-545, 5th Dist., filed Oct. 21, 1977), __, Ill. App. 3d __, __ N.E. 2d __; *People* v. *Miller*, 36 Ill. App. 3d 943, 344 N.E. 2d 760 (1st Dist. 1976); *People* v. *Bosse*, 32 Ill. App. 3d 442, 336 N.E. 2d 216 (5th Dist. 1975); *People* v. *Whitehead*, 32 Ill. App. 3d 615, 336 N.E. 2d 59 (5th Dist. 1975).)

Defendant urges this court to follow two recent decisions of the United States Court of Appeals for the Seventh Circuit: *United States ex rel. Baker* v. *Finkbeiner*, 551 F. 2d 180 (7th Cir. 1977) and *United States ex rel. Ferris* v. *Finkbeiner*, 551 F. 2d 185 (7th Cir. 1977). *Ferris* is potentially an exception to the *Wills* holding rather than an interpretation of it. Immediately before pleading guilty, Ferris asked the court if he would have a parole term and was told that he would not. That the court inadvertently misled him is quite different from a mere failure to admonish. We consider *Baker* a departure from *Wills* and decline to follow it.

Secondly, Tidwell asserts that his guilty plea was involuntary and resulted from ineffective assistance of counsel. He contends that neither the public defender nor his retained counsel thoroughly investigated his case and prepared for trial. He also alleges that after being discharged, Francis told him to plead guilty or get another lawyer. As Tidwell believed the court would not allow him to dismiss Francis and again receive the assistance of the public defender, he decided to plead guilty rather than risk receiving a severe sentence if convicted after a trial with an unprepared defense attorney.

The general rule governing alleged incompetence of retained counsel is well settled. In order for a petitioner to

prevail at the post-conviction hearing, he must clearly establish "(1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as trial attorney; and (2) substantial prejudice resulting therefrom without which the outcome would probably have been different." (*People* v. *Morris*, 3 Ill. 2d 437, 449, 121 N.E. 2d 810, 817 (1954); *People* v. *Ferrance*, 32 Ill. App. 3d 358, 361, 336 N.E. 2d 532, 534 (1st Dist. 1975); *People* v. *Mason*, 29 Ill. App. 3d 121, 126-27, 329 N.E. 2d 794, 797 (5th Dist. 1975)). Our standard for review is that the factual determinations of the post-conviction hearing judge will not be disturbed unless manifestly erroneous. (*People* v. *Bratu*, 46 Ill. 2d 143, 146, 262 N.E. 2d 921, 923 (1970); *People* v. *Wease*, 44 Ill. 2d 453, 457, 255 N.E. 2d 426, 428 (1970).)

At the post-conviction hearing, Tidwell testified that he had seen public defender Allen once, on the day Tidwell discharged him, and Francis only a few times. Thus, Tidwell concludes that neither attorney was prepared to try his case. Time spent on a case, however, does not of itself establish the quality of the work, or provide per se a standard of competence of counsel. (*People* v. *Mason*, 29 Ill. App. 3d 121, 127, 329 N.E. 2d 794, 797-98 (5th Dist. 1975).) More particularly, Tidwell alleges that neither attorney investigated or interviewed witnesses. Aside from the presumption that both attorneys had the report of the public defender's investigator, whom Tidwell admits visited him in jail three or four times, both had copies of the police reports. Further, in neither the petition for post-conviction relief nor in his testimony did Tidwell offer any suggestion as to how further investigation could have aided his case. No person who could have been a witness for the defendant at trial was identified. (*See People* v. *Dudley*, 46 Ill. 2d 305, 307-08, 263 N.E. 2d 1, 3-4 (1970) *cert den.* 402 U.S. 910 (1971); *People* v. *Ferrance*, 32 Ill. App. 3d 358,

362, 336 N.E. 2d 532, 535 (1st Dist. 1975); *People* v. *Mason*, 29 Ill. App. 3d 121, 127, 329 N.E. 2d 794, 798 (5th Dist. 1975).)

The heart of Tidwell's contention is that he feared the quality of representation he would receive at trial so, rather than risk a conviction and severe sentence, he made an involuntary plea of guilty. We find Tidwell's position to be without merit. Advising a defendant to plead guilty after appraising the likelihood of success at trial is a tactical decision which an attorney must sometimes make. (*People* v. *Ferrance*, 32 Ill. App. 3d 358, 361, 336 N.E. 2d 532, 535 (1st Dist. 1975).) Contrary to Tidwell's apparent belief, a defense attorney would have been remis had he failed to advise a defendant of the probable outcome of his trial including sentencing. (*People* v. *Bratu*, 46 Ill. 2d 143, 146, 262 N.E. 2d 921, 923 (1970).) An allegation that a defendant feared a severe sentence, even the death penalty, does not invalidate an otherwise voluntary plea. (*People* v. *Granberry*, 45 Ill. 2d 11, 14, 256 N.E. 2d 830, 832 (1970); *People* v. *Mason*, 29 Ill. App. 3d 121, 126, 329 N.E. 2d 794, 797 (5th Dist. 1975).)

Responding to the court's questions at his change of plea hearing, Tidwell stated that his guilty plea was voluntary, that he understood that he was entitled to a court-appointed attorney if he could show his indigency, and that no force or threats induced him to plead guilty. He did not complain of either attorney's incompetence at that time. In this respect, the instant case differs from *People* v. *Moone*, 45 Ill. 2d 488, 259 N.E. 2d 785 (1970), in which the record shows that the defendant told the court at his change of plea hearing that that he was pleading guilty because his attorney wanted to "get off the case." (45 Ill. 2d at 490, 259 N.E. 2d at 786).

For the foregoing reasons, we find that the denial of post-conviction relief should not be disturbed.

Finding that an opinion would have no precedential value, we affirm the judgment of the Circuit Court of Madison County pursuant to our power under Supreme Court Rule 23 (Ill. Rev. Stat. 1975, ch. 110A, par. 23).

AFFIRMED.

CONCUR: CARTER, JONES, JJ.